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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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PD-0065&0066&0067-22

Nos. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/9/2022
DEANA WILLIAMSON, CLERK

DONNELL SLEDGE, Appellant

v.

STATE OF TEXAS, Appellee

Appeal from Dallas County
Appeal Nos. 05-19-01398-CR, 05-19-01399-CR, & 05-19-01485-CR
Trial Causes F17-56048-I, F17-56046-I, & F17-56047-I

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF COUNSEL AND JUDGES

* The parties to the trial court's judgment are the State of Texas and Appellant, Donnell Sledge.

* The judge for the first trial, the motion for new trial, and some pretrial motions before the second trial was Hon. Martin Richter, Judge Presiding by Assignment for the Dallas County Criminal District Court No. 2. Hon. Andrew Kupper, also by Assignment, presided over other motions before the second trial, and Hon. James Fry, also by Assignment, presided over the second trial.

* Appellant was represented in the first trial by Denise Campbell, 2201 Main Street, Suite 1010, LB111, Dallas, Texas 75201; in the second trial by Lisa Fox, 4144 N. Central Expy, Suite 512, Dallas, Texas 75204, and by Craig Stango, 8150 Central Expy, Suite M2070, Dallas, Texas 75206.

* Appellant was represented in the Court of Appeals on original submission by Christie Merchant, 17304 Preston Rd., Suite 1250, Dallas, Texas 75252.

* Appellant was represented in the Court of Appeals on the motion for rehearing and before this Court by Ronald Goranson, 900 Jackson Street, Suite 430, Dallas, Texas 75202.

* The State was represented at both trials by Dallas County Asst. District Attorneys Melissa Meyers and Sarah Clark, 133 North Riverfront Blvd., LB-19, Dallas, Texas 75207-4399.

* The State was represented in the Court of Appeals by Asst. District Attorneys Ricardo Vela and Jaclyn Lambert, and on motion for rehearing by Doug Gladden, 133 North Riverfront Blvd., LB-19, Dallas, Texas 75207-4399.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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Nos. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

DONNELL SLEDGE, Appellant

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Appeal from Dallas County
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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

What is the effect of granting a motion for new trial on the ground that "the verdict is contrary to the law and evidence"? It might be that—regardless of intent—the acquired meaning of those words requires an acquittal. Or it might not, and the case rewinds to its position before trial. It is decidedly not what the court of appeals concluded: that it was neither, and so it granted a new punishment hearing because the first jury's rejection of special issues survived the granting of a new trial and had issue-preclusive effect on the second trial, which no competent counsel would have failed to invoke.

STATEMENT REGARDING ORAL ARGUMENT

Argument is requested to speed the Court through the case's procedural bends and assess the implications for motion-for-new-trial and collateral-estoppel law.

STATEMENT OF THE CASE

At his first trial, the jury convicted Appellant of two drug offenses and felon in possession. 1398 SuppCR 78; 1485 SuppCR 75; 1399 SuppCR 55. It rejected deadly-weapon findings on the drug cases. 1398 SuppCR 80; 1485 SuppCR 82. At punishment, it rejected the habitual-offender enhancements in each case and assessed 10- and 11-year sentences. 1398 SuppCR 92; 1485 SuppCR 94; 1399 SuppCR 67. The judge thereafter granted Appellant's motions for new trial in each case:

DEFENDANT'S MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Defendant in the above cause and by his Attorney, and moves the Court to grant him a New Trial herein for the good and sufficient reason that the verdict is contrary to the law and evidence.

Wherefore, Defendant prays the Court grant a new trial herein.

Respectfully submitted,

Attorney for Defendant

ORDER

The above Motion is hereby:

☑ (GRANTED) ☐ (OVERRULLED)

JUDGE

1398 SuppCR 109.[1] The trial court's docket sheets indicate the State was unopposed to these motions. 1398 CR 5. It did not appeal. Appellant did but it was dismissed because the new-trial grants restored the cases to their pretrial positions. *Sledge v. State*, Nos. 05-19-00085-CR through 05-19-00087-CR, 2019 WL 457692, at *1 (Tex. App.—Dallas Feb. 6, 2019, no pet.) (mem. op., not designated for publication).

At the second trial, the jury acquitted on a new charge, convicted on the original one, and said "yes" to the deadly-weapon issue in the drug cases. 10 RR 53. It found the enhancements true and assessed concurrent 28-year sentences. 11 RR 58-59.

On appeal, Appellant argued for the first time that his counsel was ineffective for not raising collateral estoppel based on the first jury's deadly-weapon and enhancement findings. The court of appeals agreed there was "no conceivable trial strategy" for not doing so and remanded for new punishment hearings. *Sledge v. State*, __ S.W.3d ___, 2021 WL 3782082 (Tex. App.—Dallas Aug. 26, 2021). Two judges who were not on the original panel filed an opinion dissenting from the denial of *en banc* consideration filed on their own motion. *Id*. (Burns, C.J., dissenting from denial of *en banc* consideration, joined by Goldstein, J.).

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[1] Where all three records are substantively the same, the State will cite to the first record for brevity.

On rehearing, the State, represented by the Dallas DA's Office, suggested all-out acquittals could be warranted because the sole ground alleged in the motions for new trial—"contrary to the law and evidence"—signified the evidence was legally insufficient and thus Double Jeopardy barred retrial. Appellant agreed and declared it "now raises that issue" in addition to collateral estoppel.[2] The State also suggested abatement to clarify whether the new trials were granted for non-sufficiency reasons.

The court of appeals denied rehearing in a written opinion. It maintained that Appellant's new-trial motions challenged only the portions of the verdict and judgment *adverse* to him. It observed there was no authority that the jury's independent factual determinations were (1) not subject to Double Jeopardy, or (2) "open to redetermination either by the trial court on a motion for new trial" or by the second jury. *Sledge v. State*, __ S.W.3d __, 2022 WL 68210, at *1 (Tex. App.—Dallas Jan. 5, 2022) (op. on denial of reh'g).

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion Aug. 26, 2021. The State's timely motion for rehearing was denied Jan. 5, 2022. This petition is due by Feb. 4, 2022.

[2] State's Motion for Rehearing, at 2, and Appellant's response, at 3, 6-7 (both available here and on the website of the Fifth Court of Appeals for Cause 05-19-01398-CR, 05-19-01399-CR, and 05-19-01485-CR.

GROUNDS FOR REVIEW

(1) Must a defendant be acquitted if the trial court grants a motion for new trial alleging only that "the verdict is contrary to the law and evidence" and the State does not appeal?

(2) Was it so certain that a first jury's "not true" findings survive the granting of a new trial and collaterally estop the State from pursuing the findings on retrial that counsel was ineffective for not so arguing?

ARGUMENT

Issue 1

The court of appeals maintained its position on collateral estoppel[3] despite the DA's Office's concern that the granting of a motion that the verdict is contrary to the law and evidence means the evidence was legally insufficient. But if the DA's Office is right, Appellant is entitled to an acquittal. If it is not, that warrants explaining.

1. *Zalman* reaffirmed a hidden, consequential meaning of a contrary-to-law grant.

Once it is determined that the State failed to prove its case at trial, Double Jeopardy prohibits a second trial. *Burks v. United States*, 437 U.S. 1, 16 (1978). A

[3] As *Rollerson v. State*, 227 S.W.3d 718, 730 n.48 (Tex. Crim. App. 2007) observed, it is really "direct estoppel" since it is being applied to the same offenses in the same litigation.

defendant does not waive this by asking for a new trial. *Id*. at 18-19. If a trial court grants a new-trial motion because the evidence was legally insufficient, the defendant must be acquitted and cannot be retried. *Hudson v. Louisiana*, 450 U.S. 40, 43 (1981).

State v. Zalman suggests the contrary-to-law ground in Appellant's motions actually means legal insufficiency because that ground "raise[s] a sufficiency challenge and *only* a sufficiency challenge." 400 S.W.3d 590, 594 (Tex. Crim. App. 2013) (emphasis in orig.). Because that bare language would not put the State on notice of evidentiary issues, on appeal, the trial court's ruling would have to stand or fall on sufficiency.[4] *Id*.

The State could prevent acquittal by successfully appealing the ruling on the motion for new trial on sufficiency grounds. But if, as here, it does not and *Zalman* is correct and applicable, the trial court's grant on a motion with only these magic words requires Appellant and others like him to be acquitted, regardless of any intent otherwise.[5]

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[4] Sufficiency now means legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010) (plurality op.). Before *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), established factual sufficiency, contrary-to-law claims were reviewed under the *Jackson v. Virginia* standard. *See, e.g.*, *Gonzales v. State*, 689 S.W.2d 900, 901 (Tex. Crim. App. 1985).

[5] Several opinions in State's appeals trace this same path from contrary-to-law ground to acquittal. *See, e.g.*, *State v. Koenig*, No. 10-19-00169-CR, 2021 WL 627864, at *1 (Tex.

2. Multiple factors undermine *Zalman*'s hidden-meaning holding.

For retrial to be barred, the basis for granting the new trial must be for legal insufficiency. A new trial ordered by a trial judge acting as a "13th juror," for instance, would not preclude retrial. *Hudson*, 450 U.S. at 44 n.5. Here, the circumstances suggest other bases besides legal insufficiency.

2.1 Usage and history show that contrary-to-law has a varied meaning.

First, the contrary-to-law-and-evidence ground—the final reason listed for granting a new trial in TEX. R. APP. P. 21.3— has long been used to describe a variety of complaints, not just legal sufficiency.[6] It functioned as a catchall when the listed

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App.—Waco Feb. 17, 2021, no pet.) (not designated for publication); *State v. Romero-Perez*, No. 03-18-00122-CR, 2020 WL 1472361, at *4 (Tex. App.—Austin Mar. 26, 2020, pet. ref'd) (not designated for publication); *State v. Gutierrez*, No. 13-13-00183-CR, 2015 WL 7820588, at *4 (Tex. App.—Corpus Christi Dec. 3, 2015) (not designated for publication), rev'd on another ground, 541 S.W.3d 91 (Tex. Crim. App. 2017).

[6] Examples include:

- a variance between the proof and the jury charge, *Ortega v. State*, 668 S.W.2d 701, 707 (Tex. Crim. App. 1983) (op. on reh'g), *overruled by Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997);
- conviction for an offense not submitted to the jury, *Idrogo v. State*, 589 S.W.2d 433 (Tex. Crim. App. 1979);
- erroneous submission of a lesser, *Crowder v. State*, 78 Tex. Crim. 344, 347 (1915);
- indictment error, *Bowen v. State*, 162 S.W. 1146, 1147 (Tex. Crim. App. 1914);
- lack of accomplice-witness corroboration. *Simms v. State*, 8 Tex. App. 230, 247, 1880 WL 8999, at *10 (1880).

grounds were exclusive.[7] Because the remedy is a new trial instead of acquittal, it is arguably better construed to mean factual, not legal, sufficiency. *See State v. Savage*, 933 S.W.2d 497, 501 n.1 (Tex. Crim. App. 1996) (Clinton, J., dissenting); *see also Youens v. State*, 988 S.W.2d 404, 407 n.2 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *State v. Bourg*, 286 So.3d 1005, 1008 (La. 2019) (construing that state's analogous ground for new trial to mean factual sufficiency).

It was because of this breadth of meaning that this Court, in decades-old cases culminating in *Zalman*, held that the phrase failed the specificity required to preserve issues on appeal. *See, e.g., Martinez v. State*, 153 S.W. 886, 889 (Tex. Crim. 1913); *Henderson v. State*, 126 S.W. 1148, 1149 (Tex. Crim. App. 1910) (observing that contrary-to-law ground was "of the most general character" but still assessing whether guilt was conclusively shown); *see also* TEX. R. CIV. P. 322 (civil rule on new trials expressly provides it is too general to be considered).

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[7] *See* Act of 1973, 63d Leg., R.S., ch. 426, art. 3, § 5, *repealed by what is now Tex. R. App. P. 21.3* ("New trials, in cases of felony, shall be granted for the following causes, and for no other…"). It may still function as a catchall. *See Clarke v. State*, 270 S.W.3d 573, 580 n.18 (Tex. Crim. App. 2008) (referring to contrary-to-law provision as a "general ground," noting that the Rules do not require greater specificity, and indicating that a trial court could grant or deny the motion on that basis if presented with evidence of a specific claim).

2.2 The State's lack of objection and appeal distinguish *Zalman*.

That appellate courts require greater specificity for non-sufficiency claims to be preserved for appeal should not matter where the trial participants agreed to the new trial. According to the docket sheet, the State was unopposed to the new trial. 1398 CR 5. Since specificity in the motion was for the State's benefit, it could waive it, giving the trial court authority to grant on a more specific basis known only to the participants. Or the trial court could have granted on a different basis. While the rules contemplate that an amendment to the new-trial motion will be written and filed, TEX. R. APP. P. 21.4(b), this is a claim-processing rule, and the State could decline to object. *See State v. Moore*, 225 S.W.3d 556, 567 (Tex. Crim. App. 2007). A different ground than that in the motion could support a trial court's ruling if it was raised and litigated, without objection, during the motion-for-new-trial proceedings. *Clarke*, 270 S.W.3d at 581. Because neither party was objecting, there would have been no incentive to document that the trial court's basis differed from what the motion articulated. The trial court's ruling could be upheld on any applicable legal theory—*i.e.*, anything that had been litigated and was a valid legal theory. *State v. Herndon*, 215 S.W.3d 901, 905 n.4 (Tex. Crim. App. 2007) (citing the right for any reason rule in new trial context).

Given the other meanings of contrary-to-law available to the parties, a deemed finding of insufficiency is inappropriate.

2.3 The trial participants' conduct makes an insufficiency ruling dubious.

There is no express reasoning in the record for the trial court's grant of a new trial. If there was a hearing on the motion for new trial, it is not in the record.[8] Even if the words "verdict is contrary to the law and evidence" are held to mean legal insufficiency generally, the trial court's failure to recognize that should not force the trial judge into a finding that he did not make. That elevates form over substance. What matters for Double Jeopardy is that there is a finding that the State failed to satisfy its burden of proof. *See Hudson*, 450 U.S. at 44.

The conduct of all the participants is diametrically opposed to a legal insufficiency finding having been made or in play. Defense counsel titled her motion

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[8] The defense requested a reporter's record for the July 25, 2018 "Motion for Rehearing (sic)," 1398 CR 78, but it is not in the appellate record. It may not have been transcribed. No one complained of its absence in the court of appeals, but the trial court may have explained the ruling. TEX. R. APP. P. 21.8(b). Appellant said in a letter to the sitting judge that "Judge Richter granted me a new trial. So, he stated he was granting me a new trial so that these D.A's can give me the max sentence & that he would make sure of it." 1398 SuppCR 112. In a later letter, he referenced his third-degree felon-in-possession punishment charge setting out the wrong range (5-99 years or life, instead of 2-10 years) and the jury's 11-year verdict. 1398 SuppCR 131; TEX. PENAL CODE § 46.04(e). A different judge marked through the jury's verdict and wrote "reformed to 10 years." 1399 SuppCR 11 (docket sheet), 64-67 (jury charge). But Appellant noted before the retrial that the "judge felt as though …one of the jurors didn't want to sentence me to the maximum," 1 SuppRR 12. Appellant also noted that because of the illegal sentence, the prosecutor told the judge Appellant would "beat…the cases on appeal." 1399 SuppCR 131.

a "motion for new trial" and asked for that remedy. Appellant's later attorneys reiterated their understanding that the trial court had granted a new trial and anticipated another trial. 1398 SuppCR 36; 2 RR 9, 14 ("We're back to square one" where the defendant could file a suppression motion for the first time). Appellant's letters and comments reflect a similar understanding. No one, including the judge who granted the motion for new trial, expressed surprise at the retrial of an "acquitted" defendant. *See, e.g.,* 2 RR 6 ("you filed a motion for new trial which I, this Judge granted") (pretrial motion before retrial).[9] The defense did not even raise the issue itself; the Dallas DA's Office did.

It is entirely believable that the trial participants had not added *Zalman* to *Burks* and thus failed to discover the hidden meaning of the motion for new trial.[10] After all, the court of appeals missed it, having dismissed his first appeal on the ground that he had a new trial pending. But the same cannot be said of a finding that the evidence was legally insufficient. Someone would have noticed that obvious

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[9] "The fact that the trial judge contemplates that there will be a new trial is not conclusive on the issue of double jeopardy." *United States v. Scott*, 437 U.S. 82, 92 (1978). But it should inform the decision whether to permit this claim for the first time on appeal.

[10] If "contrary to the law and the evidence" necessarily has such a meaning, the Rules of Appellate Procedure should be amended to remove that ground as a basis for a new trial and to provide for a motion for acquittal on the ground of legally insufficiency.

problem and said something. On such a record,[11] a Double Jeopardy violation is not "clearly apparent on the face of the record," and enforcement of the usual contemporaneous objection rule would serve the legitimate state interest of not granting the defendant a windfall. *See Ex parte Denton*, 399 S.W.3d 540, 544 (Tex. Crim. App. 2013).

3. Conclusion.

The court of appeals erred in implicitly rejecting without explanation the DA's Office motion for rehearing and Appellant's response. This issue and the current state of the law warrants either (1) a reversal because the operative language mandates Appellant be acquitted or (2) an express explanation why not. Action from this Court is needed to settle an issue likely to recur.

[11] Appellant could still raise the issue on habeas corpus and establish a record whether the trial court was finding the trial evidence legally insufficient.

Issue 2

> Was it so certain that a first jury's "not true" findings survive the granting of a new trial and collaterally estop the State from pursuing the findings on retrial that counsel was ineffective for not so arguing?

The court of appeals's ineffective assistance ruling is insupportable.

If this Court concludes that Appellant is not entitled or not yet entitled to acquittal on Double Jeopardy grounds, it should consider the court of appeals's decision that defense counsel was ineffective for failing to raise issue preclusion/collateral estoppel.

This Court has repeatedly declined to find counsel ineffective for failing to take a specific action when an issue is unsettled. *State v. Bennett,* 415 S.W.3d 867, 869 (Tex. Crim. App. 2013). Many aspects of the claim are unsettled or favor a reasonable attorney's decision not to raise the issue.

Collateral estoppel may be inapplicable in criminal cases. The United States Supreme Court has cautioned that issue preclusion principles should have only "guarded application ... in criminal cases." *Currier v. Virginia*, 138 S. Ct. 2144, 2152 (2018) (quoting *Bravo–Fernandez v. United States*, 137 S. Ct. 352, 358 (2016)). Two judges on this Court have expressed similar reservations. *State v. Waters*, 560 S.W.3d 651, 663 (Tex. Crim. App. 2018) (Newell, J., and Hervey, J., concurring).

And the continued viability of collateral estoppel is presently pending in *Ex parte Cedric Richardson*, No. PD-0284-21 (submitted Dec. 1, 2021).

Even if applicable, collateral estoppel requires an issue of ultimate fact that has been "determined by a valid and final judgment."[12] *Ex parte Adams*, 586 S.W.3d 1, 4–5 (Tex. Crim. App. 2019) (quoting *Ashe v. Swensen*, 397 U.S. 436, 443 (1970)). What happened here was glaringly un-final. The granting of the motion for new trial invalidated the original judgment. TEX. R. APP. P. 21.1(a) ("New trial means the rehearing of a criminal action after the trial court has, on the defendant's motion, set aside a finding or verdict of guilt."). It returned the case to the posture before trial, as if there had never been a final judgment. *See State v. Evans*, 843 S.W.2d 576, 577 (Tex. Crim. App. 1992); *Ex parte Campbell*, 872 S.W.2d 48, 49 (Tex. App.—Fort Worth 1994, pet. ref'd) (granting of a new trial "eliminates [a judgment's] status as being final and valid for purpose of collateral estoppel"). The court of appeals thought as much in 2019 when it dismissed Appellant's first appeal. Its later view

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[12] Some jurisdictions in civil cases permit something less than a judgment. But *Ashe* does not; nor does this Court. *See Waters*, 560 S.W.3d at 661(factoring in whether a "not true" finding was essential to the revocation judgment). The requirement aligns with the policy behind collateral estoppel, *i.e.*, respecting the inherent reliability of judgments. *State v. Huskey*, 66 S.W.3d 905, 927 (Tenn. Crim. App. 2001); *State v. Williams*, 639 P.2d 1036, 1038 (Ariz. 1982) ("The force of the estoppel is the judgment itself."). The doctrine assumes confidence that the result achieved in the initial case was substantially correct. *York v. State*, 342 S.W.3d 528, 550 (Tex. Crim. App. 2011). Where the first case has been undone, that underlying premise is gone.

that free-floating factual determinations can survive a new-trial grant runs contrary to this established law. Although the court of appeals appeared to treat them as such, neither deadly-weapon nor enhancement findings are themselves "judgments." TEX. CODE CRIM. PROC. art. 42.01, § 1 (defining "judgment" as a judge's "written declaration…entered of record showing the conviction or acquittal of the defendant, among other things). In the case of deadly-weapon findings, the statutes expressly provide that such findings are required to be *attached to* judgments.[13] *Id*. at art. 42.01, § 1(21), art. 42A.054(c).

The argument against a collateral estoppel bar is absolute for enhancement findings. Double-jeopardy protections are inapplicable to sentencing since it does not place a defendant in jeopardy for an "offense." *Monge v. California*, 524 U.S. 721, 728 (1998). Even an appellate finding of insufficiency on a sentencing enhancement will not bar the State's ability to re-litigate the enhancement issue on retrial. *Jordan v. State*, 256 S.W.3d 286, 292 (Tex. Crim. App. 2008). No greater protection should extend to a derivative of Double Jeopardy.

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[13] In *Rollerson*, this Court held that the deadly-weapon issue can be an "ultimate issue," adding: "had the trial judge [as opposed to the court of appeals] found against the State on the deadly-weapon issue, we would agree that the State could not relitigate the deadly-weapon issues in the retrial of the burglary case." 227 S.W.3d at 731. But this was dicta and the Court did not explain the circumstances under which there would be a final judgment in existence and yet the case would be relitigated.

Further, there were practical reasons not to invoke issue preclusion. Appellant had two other sequential, final felony convictions to substitute for those found "not true." SX 29 (Cause F89-81696), 28 & 28A (Cause F01-58008). And the legal argument was far from sure. The new trial was procured at the defense request, and, on our sparse record, there was nothing to support it having carved out the special-issue findings from that request. Many reasonable attorneys would have doubted their ability to carry the burden of proof as proponent of an issue-preclusion claim.

Conclusion.

Contrary to the court of appeals's opinion, the state of the law was not so clearly in favor of preclusive effect from the first jury's findings that counsel's failure to raise it would have been outrageous. Without more development of the record, this case would have been a startling set of facts upon which to argue collateral estoppel—one party (the State) could not appeal the judgment and, from the look of things, the other did not want to be bound by it.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant review, reverse the court of appeals, and affirm Appellant's convictions.

Respectfully submitted,

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/s/ *Emily Johnson-Liu*
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 3,564 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1) and words contained on images.

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of February 2022, the State's Petition for Discretionary Review was served electronically on the parties below.

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/s/ *Emily Johnson-Liu*
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APPENDIX A
Court of Appeals' Opinion

2021 WL 3782082
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Dallas.

Donnell SLEDGE, Appellant

v.

The STATE of Texas, Appellee

No. 05-19-01398-CR, No. 05-19-01399-CR, No. 05-19-01485-CR
|
Opinion Filed August 26, 2021

Synopsis

Background: Defendant was convicted in the Criminal District Court No. 2, Dallas County, of possession with intent to deliver heroin, possession with intent to deliver cocaine, and unlawful possession of a firearm by a felon. Defendant appealed.

Holdings: The Court of Appeals, Schenck, J., held that:

jury's finding against deadly-weapon and habitual-offender enhancements collaterally estopped State from litigating enhancements after new trial was granted at defendant's request;

defense counsel's failure to object to enhancements at second trial fell below objective standard of reasonableness/constituted deficient performance;

defendant was prejudiced by counsel's failure to object;

any error in submitting jury instruction on law of parties as to heroin and cocaine offenses was harmless;

modification of judgments was warranted as to assessment of court costs;

modification of judgments was warranted as to defendant's jail credits; and

modification of enhancement paragraphs in heroin judgment was warranted.

Affirmed in part as modified, reversed in part, and remanded.

Burns, J., filed opinion dissenting from denial of request for en banc consideration, joined by Goldstein, J.

On Appeal from the Criminal District Court No. 2, Dallas County, Texas, Trial Court Cause Nos. F17-56048-I, F17-56046-I, F17-56047-I

Attorneys and Law Firms

Christie Merchant, Longview, for Appellant.

Donnell Sledge, Pro Se.

Jaclyn O'Connor Lambert, John Creuzot, Dallas, Jennifer Balido, for Appellee.

Before Justices Schenck, Reichek, and Carlyle

OPINION

Opinion by Justice Schenck

***1** Donnell Sledge was tried before a jury and found guilty of possession with intent to deliver heroin, possession with intent to deliver cocaine, and unlawful possession of a firearm by a felon. The first two offenses were enhanced by his status as a habitual offender and the use of a firearm during a drug offense, while the third offense was enhanced only by his status as a habitual offender. He was sentenced to twenty-eight years' confinement in each case, with the sentences to run concurrently. In four issues, appellant urges his trial counsel was ineffective, the jury instructions were erroneous, his court costs were improperly assessed in the judgments in trial cause numbers F17-56046 and F17-56048, and all three judgments fail to correctly reflect his jail credits. In a single cross-issue, the State requests modification of the judgments in F17-56047 and F17-56048. As modified, we affirm the trial court's judgments of conviction and reverse and remand for a new punishment hearing in all three cases.

Background

On the evening of June 27, 2017, approximately ten to fifteen people, including appellant, were playing dice in a field near an apartment complex. Witnesses heard an argument between appellant and another participant, Demarcus Johnson. After the two men's argument appeared to have calmed down, Johnson's mother, Margaret Hamilton, walked toward the field, yelling, "I'm fittin' to shut the block down." A few minutes later, Hamilton, Johnson, Hamilton's two other sons, and some of their friends all ran inside the apartment complex and into a unit before shutting the door. Witnesses sitting outside the apartment watched appellant arrive at a run, while brandishing a gun, and enter the same apartment. Appellant exited the apartment to demand of the witnesses there that they inform him of where Hamilton was. When he did not locate Hamilton, appellant left the apartment in a car driven by another individual.

Appellant then proceeded down the street to the apartment complex where Hamilton lived. Appellant approached four individuals sitting on a porch in front of Hamilton's apartment complex and asked where she was. When they did not respond, he walked past them and into the apartment complex where he fired shots into the hallway, kicked in the screen door to one unit, held his gun up to the head of the man who opened the door behind the screen, and demanded to know where Hamilton was. Appellant only left when he heard someone out in the hallway say that the police were on their way.

Police officers arrived in response to the reports of gun shots, spotted what was identified by a witness as appellant's vehicle, and initiated a traffic stop of the vehicle. The vehicle pulled into the parking lot of a convenience store. Appellant got out of the car and began walking towards the store. The police officers ordered the female driver of the vehicle to remain in the car and detained appellant in the parking lot. Officers who arrived after appellant had been detained directed the female driver to get out of the car and conducted a protective sweep of the vehicle for weapons, during which they found a pistol on the driver's side floorboard, and a bag containing several smaller bags of what appeared to be illicit drugs on the passenger's side. After confirming the substances were narcotics, the police arrested appellant, searched him, seized more than $3,000 in cash, and placed him in the back of a squad car.

***2** Appellant was charged by indictment with the offenses of possession with intent to deliver four grams or more but less than 200 grams of heroin, possession with intent to deliver four grams or more but less than 200 grams of cocaine, and unlawful possession of a firearm by a felon.[1] The indictments also alleged that (1) appellant was a habitual offender and (2) he used or exhibited a deadly weapon during the commission of the drug offenses. Appellant pleaded "not guilty," and the cases proceeded to trial before a jury who found appellant guilty of all three offenses. In response to enhancement paragraphs in each case alleging appellant was a habitual offender and to the deadly-weapon paragraphs in the drug offenses, the jury found all "not true." Appellant requested a new trial in all three cases, which was granted without any specific grounds identified.

1 Appellant was also charged by a fourth indictment with aggravated assault with a deadly weapon, but he was found not guilty of that offense and thus does not appeal that acquittal.

Appellant's cases proceeded to a second trial before a jury who found appellant guilty of all three offenses. After sentencing proceedings, the jury found the enhancement paragraphs true and sentenced appellant to 28 years' confinement in each case, with the sentences to run concurrently.

Discussion

I. Ineffective Assistance of Counsel

In his first issue, appellant challenges the effectiveness of his trial counsel's assistance, arguing his counsel erred by failing to object to the State's deadly weapon and habitual offender allegations at his second trial. He urges that his counsel should have asserted collateral estoppel or issue preclusion as a bar to these enhancements because the jury from appellant's first trial found them not true. The State responds the doctrine of collateral estoppel should not apply to the first jury's findings of not true at appellant's first trial, arguing appellant's first trial did not result in a final judgment because his conviction was reversed after the grant of new trial on unspecified grounds.

To obtain a reversal because of ineffective assistance, appellant must show: (1) that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and (2) that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Garza v. State*, 213 S.W.3d 338, 347 (Tex. Crim. App. 2007).

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813. In most instances, a silent record that provides no explanation for counsel's actions or inactions will not overcome the strong presumption of reasonable assistance. *Id.* at 814. When the record clearly confirms that counsel could have deliberately selected a course of action prejudicing the defendant, speculation is unnecessary. *See Weeks v. State*, 894 S.W.2d 390, 392 (Tex. App.—Dallas 1994, no writ). Conversely, where no conceivable trial strategy could justify counsel's actions, such as where the defendant is automatically entitled as a matter of law to an acquittal or to the denial of the enhancement of his offense, the question can be resolved as a matter of law. *See Conrad v. State*, 77 S.W.3d 424, 426 (Tex. App.—Fort Worth 2002, pet. ref'd).

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. It is well established that the Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of the crime charged. *See Rollerson v. State*, 227 S.W.3d 718, 729 (Tex. Crim. App. 2007).

***3** No one would question that where the State has pursued an offense to a final judgment of acquittal, it may not initiate a new prosecution premised on the same factual theory though framed as a technically different charge. In *Ashe v. Swenson*, the

Supreme Court recognized that the Fifth Amendment guarantee against double jeopardy embodies the principle of collateral estoppel. 397 U.S. 436, 446, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) ("whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time").

Under the collateral-estoppel component of double jeopardy, the government may not litigate a specific elemental fact to a competent factfinder (judge or jury), receive an adverse finding, learn from its mistakes, hone its prosecutorial performance, and relitigate that same question of fact. *Rollerson*, 227 S.W.3d at 730. The collateral-estoppel question becomes more difficult where a jury renders either an inconsistent or incomplete verdict with the potential for factual overlap. In that situation, the defendant may argue that the affirmative answers in his or her favor should rationally compel acquittal on other, unanswered counts. That argument was rejected by the Fifth Circuit in *United States v. Yeager*, 521 F. 3d 367, 377 (5th Cir. 2008), on the theory that a rational jury would not have failed to acquit had its decision reached facts necessary to the overlapping charges. The Supreme Court reversed, holding that a jury's decision favorable to the accused is always entitled to its own preclusive force. 557 U.S. 110, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009). This is true irrespective of logical speculation over why the jury decided as it did. Unlike juries tasked with resolving civil disputes, the decision of a jury to acquit in a criminal case, being subject to the constraints of the double jeopardy guarantee, is free from any obligation of rationality and is not subject to reconsideration or correction even where it is "egregiously erroneous." *Id.* at 122–23, 129 S.Ct. 2360.

In this case, the original jury's verdict was neither incomplete nor inconsistent. The first jury was presented with the wholly distinct questions of whether appellant had committed the charged offenses, and, separately, whether he was either a habitual offender or used a firearm. While the jury was presented with substantial evidence on all three of these questions, it answered for the State only as to the first and gave affirmative answers in favor of the appellant as to the latter. Appellant was therefore entitled to a judgment in conformity with this verdict and, were we hearing an appeal from that trial we would generally be enabled, in view "of the fundamental nature of double jeopardy protections," to ignore the failure to preserve the issue below and direct rendition of that judgment. *See, e.g., Roy v. State*, 76 S.W.3d 87, 93 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (quoting *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000)). Of course, there was no appeal of the first verdict (nor could there be from the enhancement answers), and the question arises now in connection with an ineffective assistance claim anchored in the failure to seek foreclosure of the potential for enhancement at the second trial.

The State argues this record does not satisfy the requirement of a "valid and final judgment" because appellant was granted a new trial at his request, which was granted on unspecified grounds. To be sure, this Court has held, "The granting of a motion for new trial on unspecified grounds does not constitute an acquittal, even if one of the grounds raised in the motion is insufficiency of the evidence." *See Ex parte Bratcher*, No. 05-05-01564-CR, 2006 WL 226048, at *1 (Tex. App.—Dallas Jan. 31, 2006, pet. ref'd) (not designated for publication). However, in that case, the jury answered wholly against the defendant who then sought and obtained a new trial after that *guilty* verdict. *See id.* (holding original jeopardy continued after defendant successfully sought new trial after receiving guilty verdict from jury); *see also United States v. Cessa*, 861 F.3d 121, 140 (5th Cir. 2017) (holding double jeopardy does not apply to bar retrial after jury found defendant guilty when "conviction [was] set aside because of an *error in the proceedings* leading to conviction") (emphasis added) (quoting *United States v. Tateo*, 377 U.S. 463, 465, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964)); *Ex parte Leachman*, 554 S.W.3d 730, 738–39 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd) (holding no acquittal and initial jeopardy continued after defendant's conviction reversed by grant of new trial on ground other than insufficient evidence).

***4** While our appellant also moved for a new trial, the similarities end there. In a criminal trial, there is no motion to set aside a verdict *favorable to the accused.* U.S. Const. amend V; Tex. Code Crim. Proc. art. 45.040. The State cites no authority suggesting that the defendant must forego favorable portions of a verdict as a condition of challenging the balance of the verdict that was answered against him, as counsel following the initial trial did here, as a condition of seeking retrial on other, independent findings that were adverse. Neither do we have any indication that counsel at the first trial deliberately sought to set aside the jury's *favorable* answers, in which case our ineffective assistance analysis would simply move one step further back in the record.[2]

2 On the contrary, counsel's motion simply avers that the verdict was "contrary to the law and the evidence."

Next, the State urges that the doctrine of collateral estoppel applies only to a previously litigated fact that constitutes an essential element of the offense in the second prosecution such that the doctrine does not apply to the question of whether appellant used or exhibited a deadly weapon in the drug cases or whether he should be punished as a habitual offender in all three charged offenses. We disagree.

In *Rollerson*, the court of criminal appeals held, "The use of a deadly weapon can be ... subject to the principles of collateral estoppel [and] [i]f a factfinder determines a defendant did not use a deadly weapon, the State cannot contest the jury's finding of that fact in a subsequent proceeding." *See Rollerson*, 227 S.W.3d at 730. The Supreme Court has since held that even where, unlike here, a jury gives only a partially favorable decision, that decision must be given durable, forward-looking preclusive effect, even at the cost of foreclosing the State from seeking any verdict on a question that the first jury did not even reach. Accordingly, we conclude the principles of collateral estoppel apply here to the jury's findings that the deadly weapon and habitual offender enhancements were not true. *See id.*

Finally, the State urges that appellant failed to show his trial counsel's performance was deficient because the record is "silent" as far as any evidence of trial counsel's reasoning or strategy to explain the failure to object to the State's deadly weapon and habitual offender allegations at his second trial. *See Thompson*, 9 S.W.3d at 814. Indeed, we commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it. *See Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). But, when no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as he did. *See id.* at 102; *Conrad*, 77 S.W.3d at 426. Here, there is no conceivable trial strategy to justify failing to object to the State's deadly weapon and habitual offender allegations at appellant's second trial. *See Conrad*, 77 S.W.3d at 426. Accordingly, we conclude appellant established the first *Strickland* prong of deficient performance by his trial counsel.

Because appellant established the first *Strickland* prong, we now consider the second and address whether there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694, 104 S.Ct. 2052.

Counsel's failure to object to the State's deadly-weapon and habitual-offender allegations at appellant's second trial harmed appellant because it allowed the second jury to reach and consider those allegations and thus negatively impacted appellant's sentences. First, the affirmative deadly weapon finding in his drug cases prevents him from being eligible for parole until his actual time served, without consideration of good conduct time, equals one half of the sentence or thirty calendar years, whichever is less. *See* Tex. Gov't Code § 508.145(d)(2). Without the deadly-weapon finding, appellant would be eligible for parole when his actual calendar time served plus good conduct time equals one-fourth of the sentence imposed or fifteen years, whichever is less. *See id.* § 508.145(f).

***5** Second, the affirmative findings to the habitual-offender enhancement paragraphs affected appellant's punishment range in all three cases, making the minimum punishment in all three cases twenty-five years. *See* Tex. Penal Code § 12.42(d). Without the enhancement paragraphs, appellant's punishment range for the unlawful possession of a firearm by a felon case was two to ten years in prison. *See id.* §§ 12.34(a), 46.04(e). The punishment range for appellant's drug cases without the enhancement paragraphs is five to ninety-nine years in prison. *See id.* § 12.32(a); Tex. Health & Safety Code § 481.112(d). The sentence appellant received was twenty-eight years' confinement in each case, thus the harm in the unlawful possession of a firearm case was obvious and the harm in the drug cases cannot be determined because there is no way to tell how the enhancements affected the jury's decision-making during sentencing.

The State argues appellant cannot show prejudice because he has five prior felony convictions, such that even if the State were precluded from submitting the same enhancement allegations to the jury at appellant's second trial, the State still had three other prior felony convictions it could have used instead. The record contains evidence of three additional felony convictions

in addition to those used in the enhancement paragraphs in the first and second trials. However, the question asked of the first jury would remain the same as that asked of the second: was the defendant, prior to the commission of the offense charged, convicted of a prior felony offense. Thus, permitting the State to continue to allege new and different convictions would amount to permitting the State to "refine [its] presentation in light of the turn of events at the first trial." *See Ashe*, 397 U.S. at 447, 90 S.Ct. 1189. Accordingly, we conclude appellant has established the second *Strickland* prong as to all three cases.

Accordingly, we sustain appellant's first issue and remand all three cases to the trial court for a new punishment hearing. *See, e.g., Andrews*, 159 S.W.3d at 104; *see also* Tex. Code Crim. Proc. art. 44.29(b).

II. Instruction on the Law of Parties

In his second issue, appellant challenges the sufficiency of the evidence to support the trial court's jury instruction on law of parties in the heroin and cocaine cases. Appellant urges the record lacks any evidence he harbored the specific intent to promote or assist the commission of the drug offenses.

Even where proper objection is made at trial, where the evidence clearly supports a defendant's guilt as the primary actor, error in the charging on the law of parties is harmless. *See Swims v. State*, No. 05-13-01411-CR, 2015 WL 4198218, at *5 (Tex. App.—Dallas July 13, 2015, pet. ref'd) (mem. op., not designated for publication) (citing *Cathey v. State*, 992 S.W.2d 460, 466 (Tex. Crim. App. 1999)).

Here, the record established appellant's guilt as the primary actor in the convicted offenses of possession with intent to deliver heroin and cocaine. A person commits possession of a controlled substance if he knowingly manufactures, delivers, or possesses with intent to deliver heroin or cocaine. *See* Tex. Health & Safety Code §§ 481.102(2), (3)(D), 481.112. A police officer testified at trial that while appellant was detained in a squad car, appellant told the officer that the car he was riding in when he was arrested was his mother's and that everything inside belonged to him. That officer also testified appellant had a total of $3,887.91 in cash on him when he was arrested and that, "[d]ue to the narcotics that were found in the vehicle, the individual packaging, the different weights of packaging ... my training and experience leads me to believe [appellant was] engaged in the sale of narcotics...." *See Jackson v. State*, No. 05-07-00783-CR, 2009 WL 264630, at *6 (Tex. App.—Dallas Feb. 5, 2009, pet. ref'd) (not designated for publication) (holding in possession with intent to deliver case, "intent to deliver" element may be proved by circumstantial evidence, such as quantity of drugs possessed and manner of packaging). Thus, any error in submitting the instruction was harmless. *See Swims*, 2015 WL 4198218, at *5.

***6** We overrule appellant's second issue.

III. Modification of Judgments

In his third issue, appellant urges his court costs were improperly assessed in the judgments in trial cause numbers F17-56046-I and F17-56048-I, and all three judgments fail to correctly reflect his jail credits. The State agrees that all three judgments should be modified, and, in a single cross-issue, requests further modification of the judgments in F17-56047-I and F17-56048-I.

We have the power to modify an incorrect judgment to make the record speak the truth when we have the necessary information before us to do so. *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd) (en banc).

In his third issue, appellant complains of duplicative costs assessed in the judgments in trial cause numbers F17-56046 and F17-56048. Where a trial court hears all cases against a defendant together in a single criminal action, the court is to assess each court cost or fee only once, in the judgment of the highest category offense for which the defendant is convicted. Tex. Code. Crim. Proc. art. 102.073(a), (b); *see, e.g., Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013) (concluding where trial court erroneously includes certain amounts as court costs in judgment, appeals court should modify judgment to delete erroneous amount).

The record reflects that appellant was convicted of three offenses in a single criminal action, but the trial court assessed court costs of $289 in the unlawful possession of a firearm case (trial cause number F17-56046-I), $349 in the cocaine case (trial cause number F17-56047-I), and $349 in the heroin case (trial cause number F17-56048-I). The drug offenses are first degree felonies, while unlawful firearm possession is a third degree felony. *See* Health & Safety § 481.112(d); Tex. Penal Code § 46.04(e). We modify the judgments in the unlawful possession of a firearm (trial cause number F17-56046-I) and heroin cases (trial cause number F17-56048-I) to reflect court costs of $0 each and delete the court costs that are already reflected in the cocaine judgment (trial court cause number F17-56047-I). *See, e.g., Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016, pet. dism'd) (holding court costs be based on lowest cause number).

We thus sustain appellant's third issue.

In his fourth issue, appellant urges the judgments in all three cases fail to correctly reflect his jail credits. Appellant argues he remained jailed between the time of his arrest on June 27, 2017, and the last day of his trial on October 23, 2019, which totals 849 days. The judgments in the heroin and unlawful firearm possession cases reflect only 774 days, and the judgment in the cocaine case reflects only 807 days. The State agrees the credits on the judgments are incorrect and should reflect the time appellant was incarcerated from June 27, 2017, through October 23, 2019.

A defendant is given credit on his sentence for the time that he has spent in jail for the case from the time of his arrest and confinement until his sentence by the trial court. *See* Tex. Code Crim. Proc. art. 42.03, § 2(a)(1). We agree the judgments incorrectly credit appellant's jail credits. Accordingly, we modify each of the three judgments to reflect appellant's total jail time credit of 849 days.

***7** We thus sustain appellant's fourth issue.

In a cross-issue, the State urges the judgment in the cocaine case (trial cause number F17-56047) should be modified to read "Yes, a Firearm" in the field entitled "Findings on Deadly Weapon," and the judgment in the heroin case (trial cause number F17-56048) should be modified to read "pleaded not true" in the fields entitled "1st Enhancement Paragraph" and "2nd Enhancement Paragraph."

The record reflects the jury found appellant used or exhibited a deadly weapon during both drug offenses, but the judgment in the cocaine case (trial cause number F17-56047-I) reads "N/A" in the field entitled "Findings on a Deadly Weapon." However, as noted in our discussion of appellant's second issue, that allegation should not have been submitted to the second jury. Instead, we conclude the judgment in the heroin case (trial cause number F17-56048-I) should be modified to read "N/A" in the field entitled "Findings on a Deadly Weapon." Accordingly, we overrule that portion of the State's cross-point. The record also reflects that appellant pleaded not true to the first and second enhancement paragraphs in the heroin case, but the judgment reads "pleaded true." Accordingly, we modify the judgment in the heroin case (trial cause number F17-56048-I) to read:

"N/A" in the field entitled "Findings on a Deadly Weapon" and

"pleaded not true" in the fields entitled "1st Enhancement Paragraph" and "2nd Enhancement Paragraph."

We thus sustain the portion of the State's cross-issue regarding the enhancement paragraphs in the heroin case.

Conclusion

As modified, we affirm the trial court's judgments of conviction and reverse and remand for a new punishment hearing in all three cases. *See* Tex. Code Crim. Proc. art. 44.29(b).

Burns, C.J., dissenting from denial of en banc consideration, joined by J., Goldstein

DISSENTING OPINION FROM DENIAL OF EN BANC CONSIDERATION

Opinion by Chief Justice Burns[1]

1 Chief Justice Burns requested en banc consideration of this case, but the request was denied by a majority of the Court.

These three cases were tried to a jury in July of 2018. The jury convicted appellant of the charged offenses but found the deadly weapon and prior conviction allegations to be "not true." Punishment was assessed by the jury at eleven years' imprisonment. A week after the jury's verdict, an "unopposed" motion for new trial by appellant was granted. Appellant filed notices of appeal and this Court, in cause numbers 05-19-0085-CR, 05-19-0086-CR, and 05-19-0087-CR, dismissed the appeals. That panel opinion noted, "If a trial court grants a motion for new trial, it restores the case to its position before the former trial. *See* Tex. R. App. P. 21.9." Following a second trial, a jury again found appellant guilty of the three underlying offenses, found the deadly weapon allegation "true," and sentenced him to 28 years' imprisonment.

The panel opinion as it now stands concludes appellant received ineffective assistance of counsel. Specifically, the opinion concludes counsel was ineffective in failing to object to the State's enhancement allegations at the second trial on the basis that the doctrine of collateral estoppel or issue preclusion barred these enhancements because the jury from appellant's first trial found the allegations "not true." While offering no opinion as to the wisdom or propriety of expanding collateral estoppel rules in this situation, I feel compelled to write separately about the finding of ineffective assistance of counsel.[2]

2 An order granting a motion for new trial restores a case to its position before the former trial, and there is no longer a judgment in place. *See* Tex. R. App. P. 21.9(b). Once the judgment in this case was set aside by the granting of the motion for new trial, the case was returned to a position where there was no finding of guilt. *Brown v. State*, No. 05-08-01137-CR, 2010 WL 255959, at *2 (Tex. App.—Dallas Jan. 25, 2010, no pet.).

The opinion in this case in its current form relies heavily on *Rollerson v. State* for the proposition that, under the collateral-estoppel component of double jeopardy, the government may not litigate a specific elemental fact to a competent factfinder, receive an adverse finding, learn from its mistakes, hone its prosecutorial performance, and relitigate that same question of fact. *Rollerson v. State*, 227 S.W.3d 718, 730 (Tex. Crim. App. 2007). However, in *Rollerson*, appellant was convicted of seven felonies related to three burglaries. *Id.* at 721. The court of appeals affirmed four of the felony convictions and reversed the other three for factual insufficiency. *Id.* The court of appeals also found the evidence legally insufficient to support any of the deadly-weapon findings, deleted those findings from the four convictions it affirmed, and declared that the State could not seek a deadly-weapon finding on any of the reversed counts it retried. *Id.* Thus, *Rollerson* addressed the collateral estoppel issue in the context of appellant's convictions and determinations made by the court of appeals; *Rollerson* offers no guidance in the situation in this case where the trial court granted a motion for new trial and the case was restored to its position before the former trial. *See id.*; Tex. R. App. P. 21.9(b).

The protection of the Double Jeopardy clause applies only if there has been some event, such as an acquittal, that terminates the original jeopardy. *State v. Vanderbilt*, 973 S.W.2d 460, 462 (Tex. App.—Beaumont 1998, pet. ref'd); *see Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). There are only three possible jeopardy-terminating events: (1) an acquittal; (2) a trial court determination of insufficiency of the evidence leading to a directed verdict of acquittal; and (3) an unreversed determination on direct appeal that there was insufficient evidence to support the conviction. *Vanderbilt*, 973 S.W.2d at 462.

When a motion for new trial was granted at the defendant's request, and the basis was other than insufficient evidence, double jeopardy considerations do not bar a new trial. *Ex parte Queen*, 833 S.W.2d 207, 208 (Tex. App.—Houston [1st Dist.] 1992), aff'd, 877 S.W.2d 752 (Tex. Crim. App. 1994). This is because, after a new trial has been granted on grounds other than insufficient evidence, the "[a]ppellant has not gained an acquittal or suffered a final conviction" and "[n]either has he been faced with multiple punishments for the offense with which he is charged." *Id.* at 208. "Thus, appellant is not exposed to double jeopardy in the present case" because, instead, "he is in the same position as if the first trial had not occurred." *Id.* (citing *Lofton v. State*, 777 S.W.2d 96, 97 (Tex. Crim. App. 1989)) (by granting motion for new trial, trial court restores case to position before earlier trial, and "initial jeopardy continues").

> The doctrine of collateral estoppel emanating from the state and federal constitutional double jeopardy protections is not implicated in cases where double jeopardy is not applicable. *Ex parte Gregerman*, 974 S.W.2d 800, 803 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *see State v. Smiley*, 943 S.W.2d 156, 158 (Tex. App.—Amarillo 1997, no pet.) (collateral estoppel is subset of double jeopardy and has no application unless claimant previously placed in jeopardy); *Nichols v. Scott*, 69 F.3d 1255, 1269–70 (5th Cir. 1995), cert. denied, 518 U.S. 1022, 116 S.Ct. 2559, 135 L.Ed.2d 1076 (1996) (no due process basis, independent of the Double Jeopardy Clause, for the application of collateral estoppel); *Showery v. Samaniego*, 814 F.2d 200, 203 (5th Cir. 1987) (collateral estoppel applies insofar as it is necessary to safeguard against the risk of double jeopardy). Because double jeopardy protections were not implicated in this case, collateral estoppel rules are irrelevant to the Court's ineffective assistance of counsel analysis.

***8** To defeat the presumption of reasonable representation, an allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). We will not speculate to find defense counsel ineffective. *Rubio v. State*, 596 S.W.3d 410, 426 (Tex. App.—Dallas 2020), pet. granted). A silent record that provides no explanation for counsel's actions will not overcome the strong presumption of reasonable assistance. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003). Thus, if the record does not contain affirmative evidence of trial counsel's reasoning or strategy, we normally presume counsel's performance was not deficient. *See Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Moreover, "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander*, 101 S.W.3d at 111.

For these reasons, the record on direct appeal frequently is insufficiently developed to support a claim of ineffective assistance of counsel. *Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000). An ineffective assistance of counsel claim may be raised without the necessity of a motion for new trial. *Id.* at 809–13; *Rubio*, 596 S.W.3d at 422. However, the best way to make a sufficient record to support such a claim is by a hearing on an application for writ of habeas corpus or, alternatively, a hearing on a motion for new trial. *See Thompson v. State*, 9 S.W.3d 808, 814–15 (Tex. Crim. App. 1999). Only when "counsel's ineffectiveness is so apparent from the record" will an appellant asserting an ineffective assistance of counsel claim prevail on direct appeal. *Freeman v. State*, 125 S.W.3d 505, 506–07 (Tex. Crim. App. 2003).

Even when there has been an acquittal, a silent record may not support a finding of ineffective assistance of counsel. *See Broadus v. State*, No. 09-19-00438-CR, 2021 WL 1395565, at *5 (Tex. App.—Beaumont Apr. 14, 2021, pet. ref'd) (mem. op., not designated for publication). In *Broadus*, appellant was initially charged with the murder of "Joseph." *Id.* at *3. The evidence showed Joseph was shot while driving his vehicle and, after being shot, crossed over to the wrong side of the road, hitting a vehicle driven by "Pauline." *Id.* at *1. Appellant was acquitted of the murder of Joseph but was thereafter convicted by a jury of the aggravated assault of Pauline. *Id.* at *1–3. On appeal, appellant argued his prosecution should have been barred by collateral estoppel due to his acquittal for the murder of Joseph or, if that argument was waived by his counsel's failure to object, then his counsel's failure to object constituted ineffective assistance of counsel. *Id.* at *3–5. The court determined that, because appellant did not raise a double jeopardy claim at trial, it was his burden on appeal to prove that the undisputed facts showed a double jeopardy violation clearly apparent on the face of the record. *Id.* at *4. The court concluded a double jeopardy violation was not clearly apparent on the face of the record and that the record was silent on trial counsel's reasons for not raising a double jeopardy or collateral estoppel challenge either in a pretrial motion or during the trial. *Id.* at *5. As the court noted, without testimony from trial counsel, the court must presume counsel had a plausible reason for his actions. *Id.* (citing *Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd)).

In this case, concluding trial counsel was ineffective in the absence of any record at all that explains trial counsel's reasons for defending the case in the manner she did seems to be a significant error by my esteemed colleagues. There could be a number of reasons why defense counsel did not raise the issue of collateral estoppel in retrial. For one, she would have had no way to peer into the future and know or guess that a panel of our Court was willing to expand the law surrounding motions for new trial.

***9** Furthermore, it is necessary to point out that the record is silent as to the reasons the trial court granted the motion. It does appear that the State did not contest the granting of the motion for new trial. There was no reporter's record made when the motion was granted by the court below. Trial counsel for appellant may have secured the agreement of the assistant district attorney representing the State to not contest the motion for new trial if she did not raise a collateral estoppel claim on retrial. Or,

trial counsel may have also agreed not to waive collateral estoppel regarding the enhancement paragraphs because the State gave notice of appellant's numerous prior felony convictions. While it is impossible to discern from the record, there are discussions by the attorneys prior to and during voir dire that do suggest that both sides agreed that, at least for the purposes of voir dire, the jury panel needed to be qualified on a range of punishment that included a finding of two final felony convictions. On this silent record, I would conclude appellant has not overcome the strong presumption he received reasonable assistance of counsel. *See Rylander*, 101 S.W.3d at 110–11.

For the reasons discussed above, I dissent from the refusal to consider this case en banc.

Goldstein, J., joins.

All Citations

--- S.W.3d ----, 2021 WL 3782082

APPENDIX B

Court of Appeals' Opinion on Denial of Rehearing

2022 WL 68210
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Dallas.

Donnell SLEDGE, Appellant

v.

The STATE of Texas, Appellee

No. 05-19-01398-CR, No. 05-19-01399-CR, No. 05-19-01485-CR
|
Opinion Filed January 5, 2022

On Appeal from the Criminal District Court No. 2, Dallas County, Texas, Trial Court Cause Nos. F17-56048, F17-56046, F17-56047

Attorneys and Law Firms

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Jaclyn O'Connor Lambert, John Creuzot, Dallas, Jennifer Balido, Douglas Gladden, Dallas, for Appellee.

Before Justices Schenck, Reichek, and Carlyle

OPINION ON DENIAL OF REHEARING

Opinion by Justice Schenck

***1** The following explains our decision to deny the State's motion for rehearing. In that motion, the State urges the orders granting the motions for new trial either correctly stated the basis as insufficient evidence, which the State argues would require complete acquittal in all three cases, or the orders were printed on incorrect forms and were unintentionally granted on non-sufficiency bases, which the State argues would mean the second trial did not violate the Double Jeopardy Clause.

The State does not cite any authority for the proposition that a jury's actual determination of a material factual question that is legally dispositive of guilt or punishment is not subject to double jeopardy or is open to redetermination either by the trial court on a motion for new trial or by a second finder of fact. While the Supreme Court has recently clarified that the Double Jeopardy Clause requires examination of the basis for a jury's determination of the facts where the evidence and theories presented by the State potentially overlap, *e.g., Yeager v. United States*, 557 U.S. 110, 119, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009), it has long recognized that independent factual determinations, such as those at issue here,[1] are barred from re-examination. *Ball v. United States*, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed. 300 (1896) ("However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."); *see also Hudson v. Louisiana*, 450 U.S. 40, 45, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981) (reversing judgment of conviction after second trial because defendant was granted motion for new trial on evidentiary sufficiency grounds). Instead, the State focuses its argument on dismissing all three convictions. That is not so.

[1] While the first jury found that appellant had in fact unlawfully sold a controlled substance, it also found, as facts, that he did so without a firearm and was not a habitual offender at the time. Whether the jury was correct in these latter findings is beyond the power of this Court or the court below to examine. What controls, however, is that a person may commit the offense of selling a controlled substance without also using a firearm or being a repeat offender. Given that the jury had reached and answered all three questions, only those answered in favor of the State were open to re-examination.

As the State prevailed on the distinct question of whether Sledge was unlawfully in possession of controlled substances and a firearm, there is nothing in the jury's findings that would compel the conclusion that the verdict was a functional acquittal. In other words, the jury's findings are individual factual determinations, such that its findings on the enhancements are acquittals as to those ultimate facts but have no effect on its findings as to the charged offenses, which are separate ultimate facts. *See Rollerson v. State*, 227 S.W.3d 718, 730 (Tex. Crim. App. 2007). The portion of the verdict and judgment *adverse* to the defendant is properly understood as the subject of the motions for new trial,[2] thus allowing the defendant and the State to preserve their arguments for reexamination by the trial court, but at that point, only those arguments adverse to the defendant are preserved. *See Ashe v. Swenson*, 397 U.S. 436, 445–46, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) ("For whatever else [the double jeopardy] constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time.").

[2] Of course, nothing in our record suggests that appellant's counsel sought to set aside favorable answers or could provide any conceivably plausible explanation for doing so without rendering our review standard meaningless. If an unexplained—and indeed inexplicable—failure to claim an automatic, constitutionally guaranteed right to victory on theses factual questions is not within the contemplation of our review at this stage, what would be?

***2** As for the State's argument that the trial court granted the motions on non-sufficiency bases, we are obliged by the presumption of regularity to reject the notion that trial counsel entered into a secret agreement contrary to the record and the premise of this appeal and failed to record it or disclose to this Court.[3]

[3] The State's argument presupposes some agreement between trial counsel and the prosecution similar to the one imagined by my colleague in his opinion dissenting to the denial of en banc consideration of this case:

> Trial counsel for appellant may have secured the agreement of the assistant district attorney representing the State to not contest the motion for new trial if she did not raise a collateral estoppel claim on retrial. Or, trial counsel may have also agreed not to waive collateral estoppel regarding the enhancement paragraphs because the State gave notice of appellant's numerous prior felony convictions.

See Sledge v. State, No. 05-19-01398-CR, —— S.W.3d ——, ——, 2021 WL 3782082, at *9 (Tex. App.—Dallas Aug. 26, 2021, no pet. h.). Regardless of whether such an agreement may have taken place or whether it was ever recorded or written, it is not included in the record, and therefore the attorneys before us would be required by their duty of candor to this tribunal to disclose such an agreement. *See* Tex. Disciplinary R. Prof'l Conduct 3.03(a). Separately, given that this would be central to the sole dispositive issue on appeal, both counsel failing to advise the Court would be contrary to the presumptions governing this proceeding and to the implied representation that the signatory of the notice of appeal had a good faith basis for pursuing this appeal and had undertaken a reasonable investigation pursuant to his or her duties under Rule 3.01 of the Texas Disciplinary Rules of Professional Conduct. *See id.* 3.01.

Accordingly, we deny the State's motion for rehearing.

All Citations

--- S.W.3d ----, 2022 WL 68210

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